

Hon. Marsha J. Pechman
Trial Date: December 20, 2021

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

ANDREW CHERRY,

Plaintiff,

v.

PRUDENTIAL INSURANCE COMPANY
OF AMERICA,

Defendant.

Case No. 2:21-cv-00027-MJP

**DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT OR, IN THE
ALTERNATIVE, RULE 52 MOTION
FOR JUDGMENT, ON PLAINTIFF'S
CLAIM FOR BENEFITS UNDER
ERISA 29 U.S.C. § 1132(a)(1)(B)**

NOTE ON MOTION CALENDAR:

October 8, 2021

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT,
OR IN THE ALTERNATIVE RULE 52 MOTION FOR JUDGMENT,
ON PLAINTIFF'S CLAIM FOR BENEFITS
UNDER ERISA 29 U.S.C. § 1132(a)(1)(B)

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1 Defendant, The Prudential Insurance Company Of America (“Prudential”), through its
 2 attorneys and pursuant to Fed. R. Civ. P. 52 and 56, hereby submits this memorandum and
 3 respectfully moves for judgment on Plaintiff’s ERISA claim for long-term disability (“LTD”)
 4 benefits under 29 U.S.C. § 1132(a)(1)(B).

5 For the reasons set forth below, Prudential prays that its motion be granted, that judgment
 6 be entered for Prudential, that Prudential be awarded its costs and attorneys’ fees as provided by
 7 law, and that the Court grant Prudential such further relief as to which it may be entitled.

8 **I. INTRODUCTION**

9 Plaintiff Andrew Cherry stopped working as software engineer for Microsoft on June 20,
 10 2016 due to back pain that, at the time, limited his ability to sit. He was able to return to work
 11 part-time after two months, but made a claim for long-term disability (“LTD”) benefits under
 12 Microsoft’s ERISA-governed employee welfare benefit plan (the “LTD Plan”). Prudential,
 13 which insures the LTD benefits, initially approved Plaintiff’s claim while he was working part-
 14 time.

15 Prudential paid Plaintiff 26.5 months of LTD benefits. Two independent physicians who
 16 examined Plaintiff and Plaintiff’s own treating physiatrist agreed that, physically, Plaintiff was
 17 able to increase from part-time to full-time work by that point. The un rebutted report of an
 18 independent examining neuropsychologist is that Plaintiff suffers from somatic symptom
 19 disorder. Thus, to the extent Plaintiff did not return to work as the independent examining
 20 doctors (and Plaintiff’s physiatrist) agreed he should be able to, it could only be due to that
 21 mental health condition. The LTD plan however, only pays 24 months of benefits for disabilities
 22 that, like Plaintiff’s are due in whole *or in part* to mental illness and Prudential has already paid
 23 more than that.

24 The administrative record leaves no question that Prudential’s termination of benefits was
 25 correct. Should the Court disagree, however, the proper remedy would be to remand the claim to

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Prudential to determine if Plaintiff remained eligible for benefits under the LTD Plan, which provides that LTD benefits will terminate “after 24 months of payments, when you are able to work in any gainful occupation on a part-time basis but you choose not to.” Given the undisputed fact that Plaintiff could work part-time, Prudential would need to gather evidence regarding Plaintiff’s work capacity and employment activity in order to evaluate whether Plaintiff remained eligible for benefits.¹ The evidence in the record to date suggests that he stopped working part time and thus would be ineligible for further benefits in any event.

For these reasons, and as explained below, the Court should enter judgment for Prudential on Plaintiff’s ERISA claim for benefits and dismiss that claim with prejudice.

II. STATEMENT OF FACTS

A. The LTD Plan Provides Benefits Only For So Long As The Claimant Meets The Definition of “Disability”

Prudential has issued a group insurance contract to Microsoft that provides LTD coverage for certain Microsoft employees. (Dkt. 1 and 10 at ¶¶ 1.2, 2.2-2.3, 3.1; AR 4290-6290.²) The Certificate, which pursuant to the group contract sets forth the terms of the disability coverage, defines “disability” as follows:

You are disabled when Prudential determines that, due to your *sickness* or *injury*:

- you are unable to perform the material and substantial duties of your regular occupation or you have a 20% or more loss in your monthly earnings; and
- you are under the regular care of a doctor.

After 24 months of payments, you are disabled when Prudential determines that due to the same sickness or injury:

¹ Plaintiff has two ERISA claims against Prudential -- a claim for benefits under ERISA, 29 U.S.C. § 1132(a)(1)(B), and a claim for equitable relief under ERISA § 1132(a)(3) (Dkt. 1 at ¶¶ 7.1-7.14). Per the parties’ agreement and the Court’s order on August 18, 2021 (Dkt. 24), the claim for benefits will be decided “on the papers,” and the claim for equitable relief is reserved for trial.

² The citations to the bates-numbered pages from the Administrative Record, filed with the Court, are abbreviated. The full bates-numbering for the documents contained in the Administrative Record is PRU 077212-002712-XXXXXX. We refer only to the last non-zero digits of these numbers, for the sake of brevity.

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- you are unable to perform the duties of any gainful occupation for which you are reasonably fitted by education, training or experience; and
- you are under the regular care of a doctor.

(AR 4316.) The Certificate defines “regular care” as “you personally visit a doctor as frequently as is medically required, according to generally accepted medical standards, to effectively manage and treat your disabling condition(s)” and “you are receiving the most appropriate treatment and care, which conforms with generally accepted medical standards, for your disabling condition(s) by a doctor whose specialty or experience is the most appropriate for your disabling condition(s), according to generally accepted medical standards.” (AR 4317.)

Disabilities due to a sickness or injury which, “as determined by Prudential, are due in whole or part to mental illness” have a limited pay period of 24 months. (AR 4326.) The Certificate defines “mental illness” as follows:

Mental illness means a psychiatric or psychological condition regardless of cause. Mental illness includes but is not limited to schizophrenia, depression, manic depressive or bipolar illness, anxiety, somatization, substance related disorders and/or adjustment disorders or other conditions. These conditions are usually treated by a mental health provider or other qualified provider using psychotherapy, psychotropic drugs, or other similar methods of treatment as standardly accepted in the practice of medicine.

(AR 4327.)

The LTD Plan does not provide for unlimited benefits. Rather, the Certificate provides as follows:

We will stop sending you payments and your claim will end on the earliest of the following:

1. During the first 24 months of payments, when you are able to work in your regular occupation on a ***part-time basis*** but you choose not to; after 24 months of payments, when you are able to work in any gainful occupation on a part-time basis but you choose not to. ...
3. The date you are no longer disabled under the terms of the LTD Plan.
4. The date you fail to submit proof of continuing disability satisfactory to Prudential. ...

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Part-time basis means the ability to work and earn 20% or more of your indexed monthly earnings.”

(AR 4325.)

B. Plaintiff Received LTD Benefits While Working Part-Time, But Regained The Capacity To Work Full-Time Again

1. Plaintiff stopped working full-time in June 2016 but was able to work part-time only two months later.

Plaintiff is 47 years old. (AR 23.) He worked as a software engineer, a sedentary occupation, for Microsoft until he stopped working on June 20, 2016, due to low-back pain. (AR 25, 53-54, 61.) He filed a claim for Short-Term Disability (“STD”) benefits under Microsoft’s STD Program, which Prudential reviewed and Microsoft paid.³ (AR 23-27, 69-71.) He returned to work part-time on September 20, 2016, and continued to work part-time and receive STD benefits from Microsoft through January 13, 2017. (AR 239, 252, 638-47.)

2. Prudential approved Plaintiff’s claim for LTD benefits because, at that time, he could only work part-time in his regular occupation.

On February 13, 2017, as part of Prudential’s ongoing review, Prudential physical therapist Melissa Perez, PT, reviewed records from Plaintiff’s treating physiatrist (Dr. Chimes), primary care physician (Dr. Girolami), chiropractor (Dr. Barnick), and two orthopedic surgery consults, as well as physical therapy records and diagnostic imaging reports. (AR 633-36.) Ms. Perez concluded that Plaintiff’s lumbar MRI showed a left sided L5-S1 disc herniation, which was consistent with his low-back and left-leg pain, and that his current treatment records supported that he had trouble sitting and standing and increased pain with activity. (AR 633.) Ms. Perez determined that Plaintiff could sit up to 4 hours per day for 30-45 minutes at a time, with the option to alternate between sitting and standing, and occasionally walking, and lift no more than 10 pounds occasionally. (*Id.*) Ms. Perez noted that Plaintiff was engaged in physical

³ Microsoft pays for short-term disability (“STD”) benefits for employees through a separate STD Program, which Prudential administers. STD benefits are not at issue in this case.

1 therapy, taking pain medication, and seeing a chiropractor and wanted to return to skiing and
 2 work. (*Id.*) Ms. Perez opined that Plaintiff would likely be able to return to full-time work given
 3 his continued improvement. (*Id.*)

4 On February 21, 2017, Prudential approved Plaintiff's claim for LTD benefits under the
 5 LTD Plan effective January 14, 2017.⁴ (AR 638-47.)

6 3. Plaintiff continued working part-time, but then stopped
 7 working again in December 2017 without any medical
 8 justification.

9 On June 6, 2017, approximately five months after Prudential approved Plaintiff's LTD
 10 claim, Ms. Perez reviewed his updated physical therapy records. (AR 850.) The records showed
 11 that Plaintiff was working up to 15 hours/week and continued to improve, with exercises
 12 demonstrating he had both decreased pain and increased mobility. (*Id.*) In December 2017,
 13 however, only a few months later, Plaintiff took unpaid leave from Microsoft without notifying
 14 Prudential. (AR 1005, 1008, 1049, 1067, 1071.) Prudential only learned of Plaintiff's sudden and
 15 unexplained leave from Microsoft itself. On February 9, 2018, Microsoft reported that Plaintiff
 16 was scheduled to be on leave through February 28, 2018. (AR 1005, 1008, 1049, 1067, 1071,
 17 1077.)

18 On February 20, 2018, Prudential called Plaintiff to find out why he suddenly stopped
 19 working part-time. (AR 1080.) It took Plaintiff until March 7, 2018 to return Prudential's call.
 20 He said only that had not been working because it was "creating more problems," and that his
 21 new treating physiatrist, Dr. Berry, had advised him to work as he was able. (AR 1107-08.) He
 22 claimed he was going to attempt to return to work in May. (AR 1109.) Prudential's Dr. Alison
 23 Baker (board-certified in physical medicine and rehabilitation) reviewed Plaintiff's claim on

24 ⁴ Even though Plaintiff was working part-time, he still received full LTD benefits because he had a 20% or more
 25 loss in his monthly earnings. (AR 641, 4316.) The LTD Plan provides that, for the first 24 months, a claimant is
 26 considered disabled "when Prudential determines that, due to your sickness or injury: you are unable to perform the
 material and substantial duties of your regular occupation or you have a 20% or more loss in your monthly earnings;
 and you are under the regular care of a doctor. (AR 4316) (emphasis added).

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1 March 15, 2018, however, and found there was no clear medical reason for Plaintiff to stop
 2 working, and recommended that Plaintiff undergo an Independent Medical Examination (“IME”)
 3 with a physician board-certified in physical medicine and rehabilitation or orthopedics. (AR
 4 1111.)

5 4. The independent medical examination confirmed Plaintiff
 6 still had part-time work capacity.

7 Plaintiff attended the IME on April 19, 2018 with Dr. Daniel Brzusek, a physician board-
 8 certified in physical medicine and rehabilitation. (AR 1159-60, 1169, 1189-1206.) In his report,
 9 Dr. Brzusek wrote the following regarding his exam of Plaintiff’s back: “Tenderness is minimal
 10 in the lumbar paraspinal muscles. No spasms. Muscle tone: good. Gait is regular. Patient is able
 11 to heel and toe walk normally. Tandem walking is normal. Patient is able to squat. The patient is
 12 able to hop on either foot without any significant increase in pain in his lower back or leg.” (AR
 13 1193-94.) Dr. Brzusek further found that Plaintiff had only a slightly decreased range of motion.
 14 (*Id.*) Based on his examination of Plaintiff and his review of the medical records, Dr. Brzusek
 15 concluded that Plaintiff could sit for 15-30 minutes at a time up to 4 hours/day; walk 15-30
 16 minutes at a time up to 4 hours/day; lift up to 10 pounds constantly, and up to 15 pounds
 17 frequently; and perform repetitive and fine motor hand activities continuously. (AR 1199.)

18 Dr. Brzusek also found that Plaintiff’s subjective complaints were out of proportion to the
 19 objective findings and concluded that there were psychological factors affecting Plaintiff’s
 20 perception of his pain. (AR 1199-1200.) Specifically, Dr. Brzusek found that Plaintiff was “quite
 21 worried about his back situation” and “perceive[ed] himself as being impaired” but that, in his
 22 medical opinion, Plaintiff was not significantly impaired. (AR 1196, 1200.) Dr. Brzusek
 23 recommended a psychological assessment. (*Id.*)
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1 5. Plaintiff returned to work after Prudential advised him that
 2 his LTD benefits would end under the terms of the LTD
 3 Plan if he did not return to work part-time.

4 On May 22, 2018, Prudential nurse Constance Tidd reviewed Dr. Brzusek's IME report
 5 and agreed that it showed Plaintiff could work part-time. (AR 1213.) Nurse Tidd also agreed that
 6 Plaintiff should undergo a psychological evaluation. (*Id.*) Steve Lambert, a Prudential vocational
 7 rehabilitation specialist, found that Plaintiff could perform his sedentary occupation at Microsoft
 8 part-time within the restrictions outlined in the IME. (*Id.*) On June 6, 2018, Microsoft confirmed
 9 that Plaintiff had not returned to work, but that his position was still available to him. (AR 1214,
 10 1217.)

11 Accordingly, on June 6, 2018, by phone and by letter, Prudential advised Plaintiff that the
 12 IME established that he still had part-time work capacity; that Microsoft had confirmed that his
 13 position was still available on a part-time basis; and that under the terms of the LTD Plan, his
 14 LTD claim would have to be terminated if he chose not to return on a part-time basis. (AR 1219-
 15 22.) On July 2, 2018, Plaintiff returned to work three hours per day. (AR 1224, 1226, 1228-31.)

16 On July 12, 2018, to evaluate Plaintiff's continued eligibility for benefits, Prudential
 17 decided to proceed with the psychological assessment, based on Dr. Brzusek's recommendation.
 18 (AR 1232.) On July 19, 2018, Prudential explained to Plaintiff that disabilities due in whole or in
 19 part to mental illness were limited to 24 months of benefits under the LTD Plan. (AR 1234-37.)
 20 Prudential also explained to Plaintiff how the LTD Plan's definition of disability changed after
 21 24 months of payments from one based on his ability to perform his "regular occupation" to one
 22 based on his ability to perform "any gainful occupation," and that the "regular occupation"
 23 period for his claim would end on January 14, 2019. (*Id.*)

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6. Prudential obtained a second independent examination of Plaintiff which confirmed that psychological factors affected his pain complaints.

In August 2018, in order to thoroughly evaluate Plaintiff's claim and based on Dr. Brzusek's findings, Prudential requested Plaintiff attend an in-person evaluation with a psychologist. (AR 1259-63, 1283, 1293.) On August 28, 2018, Plaintiff underwent the independent psychological evaluation with Dr. James Bryan (board-certified in clinical neuropsychology). (AR 1312-1329.) While Plaintiff questioned whether he could tolerate more than three hours, he was, in fact, able to complete the interview and testing, which lasted approximately 5.5 hours. (AR 1320.)

In his September 6, 2018 report, Dr. Bryan concluded that, based on his testing, Plaintiff's excessive focus on subjective pain warranted a diagnosis of somatic symptom disorder ("SSD"). (AR 1323.) Dr. Bryan explained that this meant that Plaintiff's excessive focus upon monitoring his pain and physical status interfered with his ability to complete typical home and work tasks. (AR 1321-23.) Dr. Bryan found that Plaintiff was "highly focused upon pain symptoms" and that "[h]is self-report shows that he emphasizes pain and distress in conjunction with exertion or increase in activity." (AR 1324, 1326.) Dr. Bryan explained that cognitive behavioral strategies would likely help reduce Plaintiff's focus on pain and increase his tolerance of activity. (*Id.*) Dr. Bryan concluded that Plaintiff needed mental health treatment, such as psychotherapy through a multi-disciplinary pain program, which would likely employ a cognitive-behavioral approach for stress management, and would likely reduce his excessive focus upon and self-monitoring of pain. (AR 1328.)

On September 18, 2018, Dr. Kevin Hayes (board-certified in psychiatry) reviewed Dr. Bryan's IME report and found that it supported psychiatric impairment through January 14, 2019 in order to allow Plaintiff the opportunity to obtain the recommended treatment and gradually ramp up to full-time work. (AR 1361.) Dr. Hayes opined that Plaintiff's "psychiatric condition

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1 appears to have been present since the date of disability.” (*Id.*) On November 5, 2019, Prudential
 2 claim manager Kelly Tillotson noted that, based on Dr. Hayes’ review, restrictions and
 3 limitations related to somatic symptom disorder were supported through January 14, 2019, the
 4 24-month benefit maximum, and Prudential would request updated medical records to assess
 5 Plaintiff’s functional capacity from a physical perspective. (AR 1408.)

6 7. The IME physician reviewed the psychology IME and
 7 updated medical records, and confirmed with Plaintiff’s
 8 treating physiatrist that Plaintiff could gradually return to
 9 work full-time.

10 On January 11, 2019, as part of its ongoing, meaningful dialogue with Plaintiff,
 11 Prudential again advised him that the definition of disability under the LTD Plan changed after
 12 24 months of payments to the “any gainful occupation” definition. (AR 1673.) After obtaining
 13 updated medical records, Prudential requested that Dr. Brzusek review Dr. Bryan’s IME report
 14 and the updated records. (AR 1646, 1653-55, 1660, 1663, 1673-74, 1679.)

15 In his January 21, 2019 report (AR 1691-97), Dr. Brzusek concluded that, while Plaintiff
 16 had certain limitations, he had the physical capacity to return to work full-time by gradually
 17 increasing his hours to build up his tolerance. (AR 1693-95.) Dr. Brzusek recommended Plaintiff
 18 start with 3 hours a day for one week, and increase one hour per day each week until he reached
 19 a full 8-hour workday, over a 5-week period. (AR 1695.) Dr. Brzusek stated that the following
 20 restrictions and limitations should be in place for only six months and then reevaluated: sitting
 21 up to 1 hour at a time for a total of 4 hours per day; standing up to 30 minutes at a time for up to
 22 4 hours per day; walking up to 1 hour at a time; lifting no more than 20 pounds, carrying no
 23 more than 15 pounds; and no repetitive bending, stooping, or leaning. (*Id.*) As part of his review,
 24 Dr. Brzusek spoke to Plaintiff’s physiatrist Dr. Berry, who agreed that Plaintiff could gradually
 25 return to work full-time. (AR 1709.) Dr. Brzusek wrote a letter to Dr. Berry to confirm that he
 26 concurred in Dr. Brzusek’s assessment. (*Id.*)

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1 On January 30, 2019, Prudential vocational rehabilitation specialist Steve Lambert
 2 conducted an employability assessment using the restrictions and limitations from Dr. Brzusek's
 3 IME addendum report. (AR 1715-17.) Mr. Lambert concluded that once Plaintiff regained the
 4 ability to alternate sitting and standing throughout the work day, he could perform his regular
 5 occupation using a sit/stand workstation. (AR 1716.)

6 On February 1, 2019, Prudential approved LTD benefits under the "any gainful
 7 occupation" definition of disability because Plaintiff did not yet have the full-time work capacity
 8 given the experts agreed he would have full-time capacity after a gradual increase in hours. (AR
 9 1718-24.) Prudential also informed Plaintiff that he had exhausted benefits related to mental
 10 illness. (AR 1720.)

11 Then, on February 5, 2019, Prudential received Dr. Berry's response to Dr. Brzusek's
 12 letter. (AR 1729-31.) Dr. Berry signed indicating he "disagreed" with Dr. Brzusek's summary of
 13 their conversation but stating only that, "We discussed a gradual RTW program. He would
 14 increase his daily schedule 1 hour per week until he is back to 40 hours/week." (AR 1729.)

15 On February 22, 2019, Prudential discussed Dr. Berry's response with Plaintiff and asked
 16 about his plans to increase his hours. (AR 1742.) Plaintiff was unsure and stated that he was
 17 working 15 hours/week and seeing his physical therapist and chiropractor every other week. (*Id.*)
 18 Prudential determined that it would continue to monitor Plaintiff's hours and, if he did not
 19 increase his hours worked, would contact Dr. Brzusek to confirm his conclusion that Plaintiff
 20 nonetheless had the capacity for full-time work. (AR 1743, 1748-58.)

21 8. Prudential terminated LTD benefits because the evidence
 22 showed that Plaintiff could return to full-time work.

23 On April 8, 2019, Prudential consulted Dr. Brzusek again to confirm when Plaintiff
 24 would be able to meet the requirements of his job on a full-time basis. (AR 1760-61.) In his April
 25 9, 2019 addendum report, Dr. Brzusek reiterated that Plaintiff could increase his work hours on a

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1 gradual basis, and he “would be able to meet the requirements for four hours sitting, greater than
 2 six hours sitting and standing at the end of six weeks graduated return to work.” (AR 1777-78.)
 3 On April 18, 2019, Prudential claim manager Brandon Bartosz noted that Plaintiff was beyond
 4 the six weeks he needed for a gradual ramp-up to full-time work. (AR 1782.) Mr. Bartosz called
 5 Plaintiff that day and left a message regarding this determination. (AR 1786.)

6 By letter on April 19, 2019, Prudential terminated Plaintiff’s claim for LTD benefits
 7 effective April 1, 2019 because the evidence showed that he needed approximately six weeks to
 8 ramp up to full time and the six weeks had passed. (AR 1781-82, 1788-91.) Prudential explained,
 9 “While you have exhibited part-time work capacity over the last 9 months, the reviewing
 10 physician, as well as your treating provider, Dr. Berry, concur that you should have been able to
 11 gradually increase to full-time employment by now.” (AR 1788.)

12 9. Plaintiff appealed Prudential’s termination of benefits.

13 On October 16, 2019, Plaintiff appealed Prudential’s decision to terminate his LTD
 14 benefits with his current counsel (AR 1805-20), and submitted a copy of the Software Developer
 15 job description from O*NET, along with an October 11, 2019 letter from his physical therapist,
 16 Paige Ruffo, MPT. (AR 1807.) Ms. Ruffo claimed that she did not believe Plaintiff could work
 17 full-time because he could not comfortably sit or stand for 30 minutes at a time, and he was only
 18 capable of sitting or standing up to 4 hours per day. (AR 1873.) On October 18, 2019, Plaintiff
 19 supplemented the appeal with a letter from his chiropractor Dr. Stephen Chan, who opined that
 20 Plaintiff was limited to working part-time, with no more than 4 hours of sitting per day, and that
 21 he could walk/stand no more than 15-30 minutes at a time up to 4 hours per day. (AR 1825-26.)

22 On October 30, 2019, Prudential’s Dr. Richard Day (board-certified in physical medicine
 23 and rehabilitation) recommended obtaining yet another IME with a physician board-certified in
 24
 25

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1 physical medicine and rehabilitation. (AR 1894.) Prudential began the process for scheduling the
 2 IME.⁵ (AR 1896-1917, 1927-28, 1931.)

3 On November 19, 2019, Plaintiff's counsel submitted a functional capacity evaluation
 4 ("FCE") conducted by Christina Cassidy, OTR/L, M.Ed. on November 4-5, 2019. (AR 1938-58.)
 5 In direct contradiction to the opinions of Ms. Ruffo and Dr. Chan, Ms. Cassidy concluded that,
 6 due to low back pain, Plaintiff's projected work tolerance was 20-30 hours/week, 6 hours per
 7 day, with sitting for 30 minutes at a time up to 4 hours per day, standing for 20 minutes at a time
 8 up to 1.5 hours per day, walking for 30 minutes at a time up to 1.5 hours per day, alternately
 9 sitting/standing/walking for 3 hours at a time up to 6 hours per day, and alternately
 10 standing/walking up to 45 minutes at a time up to 2 hours per day. (AR 1941-42.) Ms. Cassidy,
 11 like the other experts, also noted that Plaintiff's responses to standardized symptom
 12 questionnaires suggested "significant symptom focus." (AR 1941, 1943, 1954-56.)

13 After confirming that Plaintiff could attend, Prudential arranged for an IME on December
 14 14, 2019 with Dr. Sanders Chai in Seattle. (AR 1933-36, 1960-61, 1986, 1989-91.)

15 10. Prudential obtained a second independent medical
 16 examination to confirm Plaintiff's capacity.

17 On December 14, 2019, Plaintiff attended the IME with Dr. Sanders Chai (board-certified
 18 in physical medicine and rehabilitation). (AR 2113-47.) Based on his examination of Plaintiff
 19 and his review of the medical records, the FCE report, and other submissions, Dr. Chai
 20 concluded that Plaintiff had certain impairments due to lumbar radiculopathy and lumbar strain,
 21 but that the restrictions and limitations reported in the FCE were temporary. (AR 2141-42.) He
 22 agreed with Dr. Brzusek that Plaintiff could gradually return to full-time work and believed it

23 ⁵ On October 30, 2019, Prudential began the process of arranging for the IME and scheduled an IME with Dr.
 24 Dennis Chong on December 5, 2019. (AR 1896-1917, 1928.) On November 7, 2019, Plaintiff's counsel called
 25 Prudential and explained that Dr. Chong's office was far away as it was in Tacoma, Washington, and requested that
 26 Prudential find a doctor who was in Seattle. (AR 1927.) On November 8, 2019, Prudential advised Plaintiff's
 counsel that it would accommodate this request and would try to find a doctor who was closer. (AR 1931.)

1 would likely take up to four months. (AR 2140-42.) At that point, Dr. Chai believed Plaintiff
 2 would have no work restrictions. (AR 2142.) Dr. Chai believed that Plaintiff's self-reported
 3 functionality limitations stemmed mainly from his somatic symptom disorder, including his
 4 extreme guarding of maneuvers, but that otherwise Plaintiff was "a physically fit middle aged
 5 man who objectively has no organic basis for functional limitations." (AR 2141-43.) Dr. Chai
 6 noted that Plaintiff stated he had resigned from Microsoft in July 2019 and was self-employed
 7 working 3-5 hours/day for five days per week, and that Plaintiff had "physically healed" and was
 8 very active physically (exercising 20 minutes twice per day, physical therapy for 30 minutes 4
 9 times/week, stretching, walking, hiking 1 mile 5-6 times/week). (AR 2136, 2138, 2143.)

10 On January 10, 2020, Prudential upheld its decision to terminate Plaintiff's claim because
 11 the supported restrictions and limitations stemmed from a somatic symptom disorder and not an
 12 organic physical impairment. Having already received 24 months of benefits based in part on his
 13 mental illness, Plaintiff was not eligible for any additional LTD benefits. (AR 2155-64, 2166-
 14 70.) Prudential also explained that the information did not support impairment that prevented
 15 Plaintiff from performing the material and substantial duties of any gainful occupation including
 16 his regular occupation. (AR 2159.)

17 11. Plaintiff filed a second appeal of Prudential's decision.

18 On August 14, 2020, Plaintiff filed a second appeal with his current counsel and
 19 submitted updated medical records, declarations from Plaintiff and his wife, a letter from Dr.
 20 Berry (his former physiatrist), and a functional capacity questionnaire completed by Dr. Singh
 21 (Plaintiff's physiatrist as of November 2019). (AR 2244-2322.) Plaintiff's declaration went on
 22 for 20 single-spaced pages of text and discussed in great detail the FCE, Dr. Chai's IME
 23 (including his detailed critique of Dr. Chai's flexion measurements and reflex tests, as well as
 24 other testing he performed), his recent work efforts, and the impact of his disability on his
 25 family. (AR 2413-2432.)

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1 In his June 17, 2020 letter, Dr. Berry stated that he did not believe that Plaintiff should
 2 have been able to return to full-time work by any date certain. (AR 2474.) In the July 23, 2020
 3 functional capacity questionnaire, Dr. Singh stated that Plaintiff could sit up to 10 minutes at a
 4 time, stand up to 10-15 minutes at a time, sit up to 4 hours in an 8-hour day, and stand/walk up to
 5 4 hours in an 8-hour day. (AR 2475-81.) Dr. Singh did not explain any reason why Plaintiff's
 6 capacity had decreased since the FCE. (*Id.*)

7 12. Prudential upholds its decision based on a file review by
 8 the second IME physician.

9 To review the appeal, Prudential asked Dr. Chai to review the updated records and other
 10 submissions. (AR 3549-50.) Prudential also confirmed with Microsoft that Plaintiff was no
 11 longer working there part-time and that his last day of employment was June 30, 2019. (AR
 12 2438, 3006.)

13 In his October 6, 2020 report, Dr. Chai explained that the new documentation did not
 14 alter his prior assessment -- he endorsed the restrictions and limitations he laid out in his IME
 15 report and reiterated his agreement with Dr. Brzusek that Plaintiff had capacity to increase to
 16 full-time work. (AR 4116-22.) Regarding Dr. Berry's letter, Dr. Chai noted that Dr. Berry did
 17 not provide any substantive evidence for his opinion. (AR 4120.) Dr. Chai stated that Dr. Singh's
 18 restrictions and limitations were a "reasonable starting point to reintroduce [Plaintiff] to work"
 19 and that Plaintiff "should be able to over time advance from such limitations and requirements."
 20 (AR 4121.) Dr. Chai continued to believe that Plaintiff's self-reported functional limitations
 21 stemmed from his somatic symptom disorder and noted that this conclusion was reinforced by
 22 the fact that Plaintiff's declaration went into great depth regarding his symptoms. (AR 4121-22.)

23 On October 13, 2020, Prudential provided Plaintiff's counsel with a copy of Dr. Chai's
 24 report and the opportunity to respond. (AR 4144-46.) On November 18, 2020, Plaintiff's counsel
 25 responded with a letter critiquing Dr. Chai's report and submitted medical records from Dr.

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Attaman, a new physiatrist whom Plaintiff first saw in August 2020. (AR 4160-4203.) Upon review, Prudential determined, in consultation with Dr. Jonathan Mittelman (board-certified in occupational medicine) that these new records would not assist in understanding Plaintiff's functional capacity given that benefits were terminated on April 1, 2019, over a year earlier. (AR 4206.)

On December 7, 2020, Prudential again upheld its decision to terminate benefits. (AR 4207-4223.) Prudential explained that, while Dr. Chai found Plaintiff had certain limitations, these limitations stemmed only from Plaintiff's somatic symptom disorder, and Plaintiff had already exhausted benefits for disabilities due in part to mental illness. (AR 4211.) Prudential also explained that, as such, Plaintiff did not have any physical impairments that prevented him performing the material and substantial duties of any gainful occupation, including his regular occupation. (*Id.*)

III. ARGUMENT

A. Standard of Review

Plaintiff bears the burden of proving by a preponderance of the evidence that he is disabled within the meaning of the LTD Plan. *See Armani v. Nw. Mut. Life Ins. Co.*, 840 F.3d 1159, 1162–63 (9th Cir. 2016); *Muniz v. Amec Constr. Mgmt., Inc.*, 623 F.3d 1290, 1294 (9th Cir. 2010). *See also Louis v. Hartford Life & Accident Ins. Co.*, No. C19-56 MJP, 2020 WL 39145, at *7 (W.D. Wash. Jan. 3, 2020) (Pechman, J.) (same), appeal dismissed, No. 20-35082, 2020 WL 4464247 (9th Cir. June 11, 2020). To prevail, Plaintiff must prove that he was unable to perform the material and substantial duties of any gainful occupation and that his disability was not due in part to mental illness. Further, if he was still able to work in any gainful occupation on a part-time basis and he chose not to do so, he would no longer be eligible for LTD benefits.

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Here, Prudential found that Plaintiff was not entitled to further LTD benefits under the LTD Plan because (1) he was able to work part-time in a gainful occupation and to increase to full-time work by April 1, 2019 but did not, and (2) he exhausted benefits payable due to mental illness because his restrictions and limitations stemmed only from somatic symptom disorder. When the review is *de novo*, the Court will conduct a trial on the administrative record under Rule 52, and the Court “may evaluate the persuasiveness of conflicting testimony and make findings of fact and conclusions of law.” *Louis*, 2020 WL 39145, at *7; *Gallupe v. Sedgwick Claims Mgmt. Servs. Inc.*, 358 F. Supp. 3d 1183, 1190 (W.D. Wash. 2019) (Pechman, J.). In doing so, “the court does not give deference to the claim administrator’s decision, but rather determines in the first instance if the claimant has adequately established that he or she is disabled under the terms of the LTD Plan.” *Muniz*, 623 F.3d at 1295–96 (9th Cir. 2010). However, where review is for abuse of discretion, the Court will decide an ERISA benefits case on cross-motions for summary judgment under Rule 56, examining the administrative record as a body of undisputed facts. *Gallupe*, 358 F. Supp. 3d at 1190.

Plaintiff concedes that the Microsoft Corporation Welfare Plan and SPD grant discretion to Prudential to interpret the LTD Plan, make factual findings, and determine eligibility for LTD benefits. (*See, e.g.*, AR 4370-71, 4384, 4388, 4742-43, 5106-07, 5470-71, 5840-41, 6274-75; Dkt. 1 and 10 at ¶ 3.2.) Although Washington has a ban on discretionary clauses, WAC 284-96-12,⁶ the cases in this district that have found that Washington’s ban applies to ERISA cases are

⁶ Wash. Admin. Code 284-96-012(1), governing group insurance policies, provides:

No disability insurance policy may contain a discretionary clause. “Discretionary clause” means a provision that purports to reserve discretion to an insurer, its agents, officers, employees, or designees in interpreting the terms of a policy or deciding eligibility for benefits, or requires deference to such interpretations or decisions, including a provision that provides for any of the following results:

(a) That the insurer's interpretation of the terms of the policy is binding;

(b) That the insurer's decision regarding eligibility or continued receipt of benefits is binding;

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distinguishable because they did not involve discretionary language in employer plan documents, as is the case here. *See, e.g., Gorena v. Aetna Life Ins. Co.*, No. C17-532 MJP, 2018 WL 3008873, at *4 (W.D. Wash. June 15, 2018); *Landree v. Prudential Ins. Co. of Am.*, 833 F. Supp. 2d 1266, 1274 (W.D. Wash. 2011) (discretionary language only in Prudential-issued certificate of coverage). The Ninth Circuit has not examined Washington's ban, and although it has ruled that California's discretionary ban is not preempted by ERISA and applies to non-insurance policy plan documents, *see Orzechowski v. Boeing Co. Non-Union Long-Term Disability Plan, Plan No. 625*, 856 F.3d 686, 695 (9th Cir. 2017), the language in California's ban is broader than the language in Washington's statute. California's ban references "a policy, contract, certificate, or agreement", CA Ins. Section 10110.6, and Washington's ban references only a "disability insurance policy." WAC 284-50-321. For these reasons, the Court should apply the abuse of discretion standard of review. *Gallupe*, 358 F. Supp. 3d at 1189-90 (applying abuse of discretion standard where plan granted Sedgwick discretionary authority).

Under the abuse of discretion standard, this Court should affirm Prudential's decision, if it is based upon a reasonable interpretation of the LTD Plan's terms and was made in good faith. *McDaniel v. Chevron Corp.*, 203 F.3d 1099, 1113 (9th Cir. 2000). *See also Howard v. Blue Cross Blue Shield*, 822 Fed. App'x 628, 629 (9th Cir. 2020) (abuse of discretion only if illogical, implausible, or without support from inferences that may be drawn from factual record).⁷

(c) That the insurer's decision to deny, modify, reduce or terminate payment, coverage, authorization, or provision of health care service or benefits, is binding;

(d) That there is no appeal or judicial remedy from a denial of a claim;

(e) That deference must be given to the insurer's interpretation of the contract or claim decision; and

(f) That the standard of review of an insurer's interpretation of the policy or claim decision is other than a de novo review.

Identical language governs individual insurance policies. *See* Wash. Admin. Code 284-50-321.

⁷ Notably, "[i]n the ERISA context, even decisions directly contrary to evidence in the record do not necessarily amount to an abuse of discretion." *Boyd v. Bell*, 410 F.3d 1171, 1178 (9th Cir. 2005) (quoting *Taft v. Equitable Life Assurance Soc'y*, 9 F.3d 1469, 1473 (9th Cir. 1993)).

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Under either the abuse of discretion or *de novo* standard, Plaintiff cannot meet his burden to establish by a preponderance of the evidence that he is entitled to additional benefits.

B. The Court Should Affirm Prudential's Decision To Terminate Benefits Because It Was Correct As A Matter Of Law.

To prevail, Plaintiff must prove that he is unable to perform the material and substantial duties of any gainful occupation due to his "sickness," here his back pain, and he must refute Prudential's conclusion that his disability was due "in whole or in part" to somatic symptom disorder. Plaintiff cannot do so. The evidence demonstrates conclusively that Plaintiff was not working to his full capacity and that he had the physical capacity to increase to full-time work. The evidence also demonstrates that his perception that he could not work full-time was due to somatization. The administrative record indeed leaves no question that Prudential's decision was correct.

1. The evidence demonstrates that Plaintiff was no longer disabled under the LTD Plan.

Prudential's decision to terminate benefits is supported by three in-person examinations by independent board-certified physicians. Drs. Brzusek and Chai, both board-certified in physical medicine and rehabilitation, agreed that, while Plaintiff had certain restrictions and limitations, he was able to work part-time and to increase his hours to full-time over a short period of time. Dr. Brzusek's belief that Plaintiff's perception of his pain impacted his self-reported functionality was confirmed by an in-person psychological exam by Dr. Bryan (board-certified in clinical neuropsychology), which returned valid results and diagnosed Plaintiff with somatic symptom disorder. The record therefore demonstrates that Plaintiff's back pain no longer prevented him from working full-time.

Initially, there is no question that Plaintiff retained the capacity to work at least part-time. When he first stopped working in June 2016, he returned to work part-time only two months later. He continued to work part-time until December 2017, at which point he stopped working

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1 without any clear medical reason. When asked by Prudential, he claimed only that working was
 2 “creating more problems,” and that his new treating physiatrist Dr. Berry had advised him to
 3 work as he was able. (AR 1107-08.) But Plaintiff had no issue returning to work part-time after
 4 Dr. Brzusek’s IME concluded he could do so, his treating physiatrist Dr. Berry agreed, and
 5 Prudential advised him that he would no longer qualify for LTD benefits under the LTD Plan if
 6 he did not return to work part-time. In fact, he was back at work at Microsoft within a matter of
 7 weeks. Plaintiff’s conduct undermines the credibility of his pain complaints -- he believed he
 8 could not work at all until he was at risk of losing his LTD benefits, and then his pain no longer
 9 prevented him from working. This behavior suggests that he *chose* not to work at all when he
 10 actually still had part-time capacity.

11 Even Plaintiff’s own FCE undermines his self-reported functionality. It found that
 12 Plaintiff should be able to work 20-30 hours/week, 6 hours per day (AR 1941-42), yet when he
 13 worked part-time for Microsoft, Plaintiff was typically working only 3 hours/day. Still, Plaintiff
 14 consistently reported that he was active with exercise, taking care of his kids, errands, driving,
 15 meal preparation, housekeeping, and financial management (AR 1316-1318, 2138), all
 16 supporting that he had capacity to work full-time. While Plaintiff’s (former) treating physiatrist
 17 Dr. Berry never provided a date certain that Plaintiff could return to full-time work (AR 2474),
 18 he confirmed that he did discuss (and agreed upon) a gradual return-to-work program with Dr.
 19 Brzusek, through which Plaintiff “would increase his daily schedule 1 hour per week until he is
 20 back to 40 hours/week.” (AR 1729.) Further, Plaintiff’s own evidence was inconsistent, with the
 21 FCE finding that Plaintiff could work 20-30 hours/week, up to 6 hours per day, and his physical
 22 therapist stating that he could only work up to 4 hours/day. (AR 1807, 1941-42.) And while
 23 Plaintiff’s chiropractor opined that Plaintiff was limited to working part-time, with no more than
 24 4 hours of sitting and walking/standing for 15-30 minutes at a time up to 4 hours per day, (AR
 25 1825-26), Prudential’s vocational review concluded that Plaintiff actually could have performed

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1 his regular occupation full-time within these restrictions by using a sit-stand workstation. (AR
2 1716.)

3 But beyond this, there is no dispute that Plaintiff was able to increase to full time work.
4 Dr. Brzusek said so after examining Plaintiff. (AR 1189-1206, 1693-95.) Dr. Berry agreed. (AR
5 1729.) Dr. Chai examined Plaintiff and found there to be no physical reason why he could not
6 work. These conclusions defeat any claim for further LTD benefits.

7 Plaintiff cannot meet his burden under the LTD Plan to prove that he remained unable to
8 perform the material and substantial duties of any gainful occupation, including his regular
9 occupation as a software engineer, due to his back pain, and Prudential correctly terminated his
10 claim for LTD benefits.

11 2. Plaintiff's treating providers' opinions are not entitled to
12 more weight.

13 Prudential carefully considered the opinions of Plaintiff's treating providers, but there is
14 no reason for the Court to tip the scales in favor of his treating providers' conclusions over the
15 consistent opinions of the three independent physicians who conducted in-person examinations
16 of Plaintiff (two board-certified psychiatrists and one clinical neuropsychologist). In fact,
17 Plaintiff's treating psychiatrist, and the doctor who had certified disability, Dr. Berry, initially
18 agreed with Dr. Brzusek that Plaintiff should be able to gradually increase his hours to return
19 full-time. However, on second appeal, after evidently having been replaced by a new treating
20 doctor who offered more favorable opinions, Dr. Berry tried to walk back his earlier concession.
21 But even then, all he said was that he never agreed that Plaintiff should have been able to return
22 to full-time work by any date certain. This does nothing to undermine the fundamental point that
23 Plaintiff did have the capacity to ramp back up to full-time work. (AR 1729, 2474.) On second
24 appeal, Plaintiff had his new psychiatrist, Dr. Singh, opine on his capacity, and his restrictions and
25 limitations were, in fact, more restrictive than any physician's so far; for example, Dr. Singh

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1 stated Plaintiff could only sit up to 10 minutes at a time, while the FCE found that Plaintiff could
 2 sit up to 30 minutes at a time. (AR 1941-42, 2475-81.) Dr. Singh did not explain the basis for
 3 these suddenly and dramatically increased restrictions. He offered nothing to refute the
 4 conclusions of Plaintiff's own FCE that refuted these restrictions. (*Id.*)

5 As the Seventh Circuit recognized, "physicians naturally tend to support their patients'
 6 disability claims, and so we have warned against the biases that a treating physician may bring to
 7 the disability evaluation." *Hawkins v. First Union Corp. Long-Term Disability Plan*, 326 F.3d
 8 914, 917 (7th Cir. 2003) (quotation omitted). Likewise, in this District, "[a] plan administrator
 9 'may not arbitrarily refuse to credit a claimant's reliable evidence, including the opinions of a
 10 treating physician,' but is not required to automatically 'accord special weight to the opinions of
 11 a claimant's physician.'" *Taylor v. Reliance Standard Life Ins. Co.*, 837 F. Supp. 2d 1194, 1206
 12 (W.D. Wash. 2011) (quoting *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 834
 13 (2003)). *See also Biggar v. Prudential Ins. Co. of Am.*, 274 F. Supp. 3d 954, 968-69 (N.D. Cal.
 14 2017), appeal dismissed, No. 17-16780, 2018 WL 1176557 (9th Cir. Jan. 19, 2018) ("It is not
 15 improper to discount even a treating physician's diagnosis where it does not have supportive
 16 objective evidence, is contradicted by other statements and assessments of the claimant's
 17 medical condition, and is based on the claimant's subjective descriptions of pain."; entering
 18 judgment for defendant on *de novo* review) (internal quotation and citation omitted); *Martin v.*
 19 *Aetna Life Ins. Co.*, No. 15-7355, 2016 WL 6997484, *10 (C.D. Cal. Nov. 30, 2016)
 20 ("[S]ubjective complaints of pain conveyed to a treating physician are inherently self-serving").

21 Here, Prudential had ample reason to discount the conclusions of Plaintiff's treating
 22 doctors. It received the thorough and consistent opinions of three independent physicians -- two
 23 board-certified in physical medicine and rehabilitation, and one clinical neuropsychologist -- all
 24 of whom personally examined Plaintiff. Prudential's decision to deny benefits was unequivocally
 25 supported by all three of these independent physicians. Prudential did all that it could to

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thoroughly evaluate the medical evidence in Plaintiff's file. *See, e.g., DeBenedictis v. Hartford Life & Acc. Ins. Co.*, 701 F. Supp. 2d 1113, 1133 (D. Ariz. 2010) (administrator did not abuse its discretion in terminating LTD benefits, where it obtained "thorough and unbiased" IME, which supported that claimant's back pain did not prevent him from working in sedentary or light duty occupation); *DiPietro v. Prudential Ins. Co. of America*, No. 03 C 1018, 2004 WL 626818, *6 (N.D.Ill. Mar. 26, 2004) ("Insurance providers are not required to seek independent medical evaluations, but an evaluation by the insurer is evidence of a thorough investigation into the claim"). Prudential's reviewing physicians examined Plaintiff and considered the entire record. In contrast, the opinions of Plaintiff's treating doctors were inconsistent, ranging from agreeing with the IME by Dr. Brzusek to imposing restrictions more stringent than Plaintiff's own FCE. Prudential correctly afforded the conflicting opinions of Plaintiff's treating providers' less weight based on a lack of objective evidence demonstrating that Plaintiff's alleged functional impairments continued to prevent him from working full-time. There is no reason for the Court to disturb that result.

3. Plaintiff was not entitled to ongoing benefits because his impairment was due in part to somatic symptom disorder.

Two independent psychiatrists who examined Plaintiff and Plaintiff's own treating psychiatrist agreed that, physically, Plaintiff should be able to increase from part-time to full-time work. Yet he never did. Based on the three IMEs it obtained, Prudential determined that Plaintiff's failure to return to work full-time was due to somatic symptom disorder. Dr. Brzusek believed that Plaintiff's subjective complaints were out of proportion to objective findings and that there were psychological factors affecting his perception of his pain. (AR 1199-1200.) Dr. Bryan's independent psychological exam of Plaintiff then confirmed that Plaintiff's focus on subjective pain warranted a diagnosis of somatic symptom disorder, meaning that Plaintiff's excessive focus upon monitoring his pain and physical status interfered with his ability to work.

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(AR 1321-23.) Dr. Chai agreed that Plaintiff's self-reported functionality limitations stemmed mainly from his somatic symptom disorder. (AR 2141-43.) Even the FCE report noted that Plaintiff's responses to standardized symptom questionnaires suggested "significant symptom focus." (AR 1941, 1943, 1954-56.) Plaintiff refuted none of this on appeal. (AR 1805-20, 2244-2322.) He submitted no evidence whatsoever contradicting Dr. Bryan's conclusions.

Prudential thus correctly determined that Plaintiff was not entitled to further LTD benefits based on the LTD Plan's 24-month mental illness limitation. The clear and unambiguous language of the LTD Plan provides that disabilities due to a sickness or injury which, "as determined by Prudential, are due in whole or part to mental illness" have a limited pay period of 24 months, and the LTD Plan's definition of "mental illness" includes "somatization." (AR 4326-27.) *See Ringwald v. Prudential Ins. Co. of Am.*, 754 F. Supp. 2d 1047, 1057-59 (E.D. Mo. 2010) (upholding application of identical 24-month mental illness limitation where plaintiff's disability was in part caused by depression and bipolar disorder). Here, Dr. Brzusek and Dr. Chai examined Plaintiff and agreed that his self-reported complaints were out of proportion to the objective evidence and that he should be able to return to work full-time. (AR 1199, 2142-43.) Dr. Bryan's psychological exam confirmed that Plaintiff's focus on his pain interfered with his ability to work. (AR 1321-23.) The evidence showing that Plaintiff's disability was due at very least in part to somatic symptom disorder is uncontroverted. Prudential has already paid more than 24 months of LTD benefits; Plaintiff is not entitled to further benefits.

4. Plaintiff was not receiving appropriate care for his somatic symptom disorder and thus was not disabled under the LTD Plan.

To qualify for ongoing LTD benefits, Plaintiff had to be "under the regular care of a doctor." (AR 4316-17.) Dr. Bryan diagnosed Plaintiff with somatic symptom disorder, believed that cognitive behavioral strategies would likely help reduce Plaintiff's focus on pain and increase his tolerance of activity, and recommended that Plaintiff undergo mental health

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1 treatment, such as psychotherapy through a multi-disciplinary pain program. (AR 1323, 1328.)
 2 Plaintiff, however, did not submit any evidence that he received “appropriate treatment and care”
 3 for his mental health condition. For this additional reason, Plaintiff did not meet the definition of
 4 disability under the LTD Plan.

5 **C. If the Court Finds Plaintiff Remained Disabled Beyond April**
 6 **1, 2019, the Proper Remedy Is Remand for Determination of**
 7 **Whether He Continued To Be Eligible for Benefits Once He**
 8 **Stopped Working for Microsoft.**

9 Plaintiff’s employment with Microsoft ended in July 2019, but it is not clear from the
 10 record how much Plaintiff actually worked beyond April 15, 2019. (AR 1996-2013.) Even
 11 accepting as true Plaintiff’s arguments that he was unable to work full-time, the LTD Plan
 12 provides that LTD benefits will terminate “after 24 months of payments, when you are able to
 13 work in any gainful occupation on a part-time basis but you choose not to.” (AR 4325.) There
 14 was unanimous agreement among Plaintiff’s treating providers (physical therapist, chiropractor,
 15 and physiatrists), the FCE, and the IME physicians that Plaintiff had capacity to work at least
 16 part-time. (AR 1693-95, 1729, 1777-78, 1941-42, 2140-42.) Given this undisputed fact, if the
 17 Court determines that Plaintiff remained disabled from full-time work beyond April 1, 2019 and
 18 that the 24-month mental illness limitation does not apply, the proper remedy would be to
 19 remand the claim to Prudential to determine if Plaintiff remained eligible for LTD benefits under
 20 the LTD Plan. *See Mongeluzo v. Baxter Travenol Long Term Disability Ben. Plan*, 46 F.3d 938,
 21 944 (9th Cir. 1995) (“additional evidence is necessary to conduct an adequate *de novo* review of
 22 the benefit decision” and district court may remand to the LTD Plan administrator for an initial
 23 factual determination); *Bunger v. Unum Life Ins. Co. of Am.*, 196 F. Supp. 3d 1175, 1186 (W.D.
 24 Wash. 2016) (on *de novo* review, court can remand a disability claim to the LTD Plan
 25 administrator if the record is not sufficiently developed).

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Prudential would need to evaluate Plaintiff's ongoing capacity as well as gather evidence on Plaintiff's employment and conduct a vocational review to determine if there are gainful occupations Plaintiff could continue to perform on a part-time basis. Plaintiff would have to submit evidence proving that he has continued to work part-time. *See, e.g., Richards v. Unum Life Ins. Co. of Am.*, No. 1:09-CV-953, 2010 WL 4117364, at *8 (W.D. Mich. Oct. 19, 2010) (on *de novo* review, upholding termination of LTD benefits where plaintiff's treating physicians, Unum's medical consultants, and two FCEs confirmed that plaintiff was capable of at least sedentary part-time work); *Richardson v. Triad Hosps., Inc. Grp. Long Term Disability Plan*, No. CIV.A 409104TLW, 2010 WL 503103, at *19 (D.S.C. Feb. 8, 2010) (upholding decision to terminate LTD benefits where plaintiff had part-time work capacity to perform sedentary work but chose not to work in any gainful occupation on a part-time basis). On remand, Prudential will be able to determine if Plaintiff remains eligible for benefits with the aid of updated medical and vocational reviews. The Court should thus remand Plaintiff's claims for further review if it does not find that Prudential correctly denied the claim. *See, e.g., Mongeluzo*, 46 F.3d 938 at 940; *Bunger*, 196 F. Supp. 3d at 1186.

IV. CONCLUSION

The Court should enter judgment for Prudential on Plaintiff's claim for benefits under ERISA, 29 U.S.C. § 1132(a)(1)(B).

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1 DATED: September 10, 2021

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CERTIFICATE OF SERVICE

I hereby certify that I have caused a true and correct copy of the foregoing DEFENDANT'S
RULE 52 MOTION FOR JUDGMENT ON PLAINTIFF'S CLAIM FOR BENEFITS UNDER ERISA 29 U.S.C.
§ 1132(a)(1)(B) to be served upon the following, by the Court's ECF system, on this 10th day of
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